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Oil and Gas, Natural Resources, and Energy Journal

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WEST VIRGINIA



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I. Introduction

This Article summarizes and discusses important developments in West Virginia oil and gas law between July 1, 2017, and June 30, 2018. Part II of this Article will discuss common law developments in both state and federal courts in West Virginia and Part III will discuss statutory developments of enacted legislation.

II. Judicial Developments

First, this section will discuss the oil and gas cases decided by the West Virginia Supreme Court of Appeals. Second, it will examine a decision issued by the United States District Court for the Southern District of West Virginia that was affirmed by the United States Court of Appeals for the Fourth Circuit.

A. West Virginia Supreme Court of Appeals

L&D Investments, Inc. v. Mike Ross, Inc.

On May 22, 2018, the West Virginia Supreme Court of Appeals issued its ruling in *L&D Investments, Inc. v. Mike Ross, Inc.*, addressing the validity of a duplicate tax deed and the effect of the three-year statute of limitations regarding delinquent tax sales for voidable deeds.¹ Starting in 1903, multiple parties created multiple real property tax assessments for two contiguous tracts of land, including an assessment entered under one name for an undivided 100 percent interest in the oil and gas—referred to as the “master assessment.”² At the same time, other parties created separate real property tax assessments for undivided interests in the same oil and gas that was already covered by the master assessment; this scenario is not uncommon in West Virginia.³ All of the taxes levied under these various assessments were paid until 2000, when the taxes due and owing under the master assessment were not paid and it became delinquent.⁴ In 2003, the tax lien associated with the master assessment was sold and ultimately a tax deed was issued to Mike Ross, Inc. (“MRI”) for the oil and gas interest associated with the delinquent master assessment.⁵ Eventually, litigation ensued over the true ownership of the oil and gas interests and the

1. *L&D Investments, Inc. v. Mike Ross, Inc.*, No. 17-0325, 2018 WL 2405989 (W. Va. May 22, 2018).

2. *Id.* at *3.

3. *Id.*

4. *Id.*

5. *Id.*

proper payment of royalties for the oil and gas produced from the land.⁶ The Circuit Court of Harrison County concluded that the tax deed to MRI was valid because the owners of the separately assessed interests had failed to pay the taxes due and owing under the master assessment, which had included their interests.⁷ Moreover, the circuit court determined that the owners of the separately assessed interests could not challenge the validity of the tax deed to MIR because their claims were barred by the three-year statute of limitations.⁸

On appeal, the West Virginia Supreme Court of Appeals reversed the circuit court's decision and ruled in favor of the owners of the separately assessed interests, reiterating the Court's holding in *State v. Allen*⁹ where the Court had held that "[i]n [a] case of two assessments of the same land[,] . . . one payment of taxes under either assessment is all the state can require."¹⁰ The Court found, contrary to the circuit court's ruling, and albeit through a complicated set of facts, that the owners of the separately assessed interests had continually paid the taxes assessed under their separate assessments, even after the master assessment was sold as delinquent.¹¹ Because the oil and gas owners had paid the taxes owed under the separate assessments, the master assessment tax deed was void, and thus, the statute of limitations, which only applies to voidable tax sale deeds, did not apply.¹² The statute¹³ protects voidable deeds, not deeds that are void—which have no statute of limitations.¹⁴ Accordingly, the Court remanded the case to the circuit court.¹⁵

Gastar Exploration Inc. v. Rine

On October 19, 2017, the West Virginia Supreme Court of Appeals issued its opinion in *Gastar Exploration, Inc. v. Rine*, in which the Court determined that a reservation of one-half of the oil and gas was ambiguous and that it was appropriate to consider extrinsic evidence to determine the parties' intent.¹⁶ In 1957, the Franklins, who owned a tract of land in fee,

6. *Id.* at *4.

7. *Id.*

8. *Id.*

9. *State v. Allen*, 64 S.E. 140 (W. Va. 1909).

10. *L&D*, 2018 WL 2405989, at *6 (citing *Allen*, 64 S.E. at 140).

11. *Id.* at *7-8.

12. *Id.* at *8.

13. W. VA. CODE ANN § 11A-4-4 (West 2018).

14. *L&D*, 2018 WL 2405989, at *8.

15. *Id.* at *9.

16. *Gastar Expl. Inc. v. Rine*, 806 S.E.2d 448, 454-58 (W. Va. 2017).

sold the tract to the Yohos, but they reserved one-half of the oil and gas.¹⁷ For the next twenty years, the tax assessments reflected that the Franklins owned an undivided one-half interest in the oil and gas and that the remaining undivided one-half interest in the oil and gas, as well as the surface, were owned by the Yohos.¹⁸ In 1977, the Yohos conveyed “the same property” to the McCardles by means of a deed that included the identical reservation language that was used in the 1957 deed.¹⁹ After 1977, the Yohos were not assessed for any taxes on the surface for the oil and gas, but their former assessment was transferred to the McCardles, who proceeded to pay the assessed taxes for over 30 years.²⁰ After Ms. McCardle signed an oil and gas lease with Gastar Exploration in 2008, the Yoho heirs—through their estate administrator Gary Rine—filed a complaint, asserting that the Yohos had not conveyed their interest in the oil and gas to the McCardles.²¹ Initially, the Circuit Court of Marshall County decided that the 1977 deed was unambiguous and that the Yohos had reserved an undivided one-half interest in the oil and gas in the 1977 deed.²²

On appeal, the West Virginia Supreme Court of Appeals reversed and remanded the case, holding that the circuit court erred in finding the 1977 deed as unambiguous.²³ In reaching this conclusion, the Court noted the longstanding contract rule that if a deed is ambiguous on its face, a court must look to extrinsic evidence of the parties’ intent—including the parties’ conduct “before and after” delivery of the deed.²⁴ Furthermore, the Court noted that a deed will be rendered ambiguous if reasonable minds might disagree as to its meaning.²⁵ In this case, the deed was poorly drafted and reasonable minds could disagree as to exactly what had been conveyed, particularly because the deed contained no expressed intentions by the Yohos regarding the one-half oil and gas reservation.²⁶ The Court interpreted the ambiguous language in favor of the grantee, in part because of the canons of construction that favor the grantee over the grantor in the

17. *Id.* at 452.

18. *Id.*

19. *Id.*

20. *Id.* at 453.

21. *Id.*

22. *Id.*

23. *Id.* at 457.

24. *Id.* at 455.

25. *Id.*

26. *Id.* at 456.

interpretation of an ambiguous conveyance, as well as the conduct of the parties after the delivery of the deed, specifically the fact that the McCardles had paid the taxes on the surface and the oil and gas for more than three decades.²⁷

B. Federal Courts

EQT Production Company v. Wender

On August 30, 2017, the United States Court of Appeals for the Fourth Circuit issued its ruling in *EQT Prod. Co. v. Wender*, which concerned whether a county ordinance could prohibit an injection well operator from disposing of wastewater within the county in spite of the fact that state and federal laws permitted such wastewater disposal.²⁸ Under the West Virginia Oil and Gas Act (“O&G Act”),²⁹ the West Virginia Department of Environmental Protection is broadly responsible for regulating and permitting oil and gas wells.³⁰ Under the O&G Act, disposal wells are also subject to permit requirements of federal laws,³¹ including the Safe Drinking Water Act (“SDW Act”).³² Pursuant to the applicable laws, the injection well operator obtained permits for a single disposal well in Fayette County, West Virginia.³³ On January 12, 2016, the Fayette County Commission enacted a ban on disposal wells which prohibited the “storage, treatment, injection, processing or permanent disposal” of wastewater in Fayette County, West Virginia.³⁴ The injection well operator challenged the county ordinance in federal court; the United States District Court for the Southern District of West Virginia held that the county ban was preempted by the state’s permit program and granted summary judgment in the injection well operator’s favor.³⁵ Additionally, the district court permanently enjoined the ban and the county appealed.³⁶

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court in all respects.³⁷ In West

27. *Id.*

28. *EQT Prod. Co. v. Wender*, 870 F.3d 322, 325 (4th Cir. 2017).

29. W. VA. CODE ANN. §§ 22-6-2 et seq. (West 2018).

30. *EQT*, 870 F.3d at 325.

31. W. VA. CODE ANN. § 35-4-7.2 (West 2018).

32. 42 U.S.C.A. § 300f (West 2018).

33. *EQT*, at 327.

34. *Id.*

35. *Id.* at 329.

36. *Id.*

37. *Id.* at 337.

Virginia, county commissions only have the limited powers granted to them by the West Virginia Constitution and by the West Virginia Legislature, which makes the county's legislative powers subordinate to acts of the West Virginia Legislature.³⁸ In this case, the county's ban on disposal wells was inconsistent with the state's statutory authorization of disposal wells. The county argued that the Legislature had delegated authority to it to enact ordinances to abate pollution.³⁹ However, like the district court, the Fourth Circuit disagreed.⁴⁰ Furthermore, the Court noted that it did not need to decide the question of federal preemption under the SDW Act because of the state preemption.⁴¹ Ultimately, the Court found no error on the part of the district court and affirmed that inconsistencies with county ordinances against state statutes must be resolved in favor of the state.⁴²

III. Statutory Developments

The 83rd West Virginia Legislature completed its second regular session on March 10, 2018. In total, 1,778 bills were introduced, 260 of which were sent to the Governor for his signature, and three will primarily affect the oil and gas industry.

Senate Bill 360

First, Senate Bill 360 clarified the legislature's intent pertaining to W. Va. Code § 22-6-8 and abrogated the holding of the West Virginia Supreme Court of Appeals in *Leggett v. EQT Prod Co.*⁴³ The legislature answered the challenge set forth in the majority and concurring opinions in *Leggett* to "enact specific provisions to assure fairness and reasonableness in the calculation of post-production costs."⁴⁴ Previously, W. Va. Code § 22-6-8(e) provided that working interest owners were to pay mineral owners royalties of no less than one-eighth of the total amount received for flat-rate wells.⁴⁵ Yet, the minimum royalty statute was interpreted in *Leggett* to mean that royalties for flat-rate leases could be calculated using a "net-

38. *Id.*

39. *Id.* at 333-34.

40. *Id.*

41. *Id.* at 332.

42. *Id.* at 337.

43. S.B. 360, 83d Leg., Reg. Sess. (W. Va. 2018); *Leggett v. EQT Prod. Co.*, 800 S.E.2d 850 (W. Va. 2017).

44. *Leggett*, 800 S.E.2d at 869 (Workman, J., concurring).

45. W. VA. CODE ANN. § 22-6-8(e) (West 2018) (amended 2018).

back” or “work-back” method—which permitted deductions for post-production costs in calculating the royalties.⁴⁶

The statute has now been amended to more clearly state that on flat-rate leases, mineral owners shall be paid a royalty of no less than one-eighth “of the gross proceeds, free from any post-production expenses.”⁴⁷ The law took effect on May 31, 2018, but a lawsuit has been filed challenging the constitutionality of the amended statute.⁴⁸

House Bill 4268

Second, House Bill 4268, named the “Co-Tenancy Modernization and Majority Protection Act,” eased the West Virginia rule that had characterized oil and gas production by only some, but not all, of cotenants as waste.⁴⁹ The previous law, which required consent, usually by means of obtaining an oil and gas lease, from one-hundred percent of the owners of the oil and gas in a given tract prior to drilling a well,⁵⁰ set West Virginia apart from other oil-and-gas-producing states by greatly limiting the options for exploration and production companies. Given the long history of mineral severances, and the frequency of highly fractionated mineral ownership, acquiring consent from all of the co-tenants in the development of oil or natural gas often proved very difficult and sometimes impossible. The new law, which took effect on June 3, 2018, established a mechanism by which a parcel can be developed absent consent from all of the co-owners.⁵¹

Now, in situations where the oil and gas is owned by seven or more cotenants and at least seventy-five percent of the ownership has consented to development, the oil and gas can be lawfully developed, even over the objection of the non-consenting minority of owners.⁵² Once the thresholds are met, a non-consenting co-tenant must choose to either (1) receive a pro rata share of the royalty—free from post-production deductions—at the highest rate to be received by a consenting co-tenant or (2) participate in the

46. *Leggett*, 800 S.E.2d at 868.

47. W. VA. CODE ANN. § 22-6-8(e) (West 2018).

48. Brad McElhinny, *EQT Sues WV Government Over New Royalties Law*, METRO NEWS (Apr. 14, 2018, 6:35 AM), <http://wvmetronews.com/2018/04/14/eqt-sues-wv-government-over-new-royalties-law/>.

49. H.B. 4268, 83d Leg., Reg Sess. (W. Va. 2018).

50. W. VA. CODE ANN. § 37-7-2 (West 2018) (amended 2018).

51. See H.B. 4268, 83d Leg., Reg Sess. (W. Va. 2018).

52. W. VA. CODE ANN. § 37B-1-4(a) (West 2018).

development of the tract.⁵³ The bill also contains provisions protecting unknown or missing owners⁵⁴ and prohibiting surface disturbance.⁵⁵

House Bill 4270

Third, House Bill 4270,⁵⁶ referred to as the “Check Stub Bill,” provides greater uniformity and transparency to mineral owners for royalty payments.⁵⁷ The new law, which took effect on June 8, 2018, now requires oil and gas producers to disclose certain information to royalty owners—such as API well numbers, amounts of oil or gas produced, and prices for each product sold.⁵⁸ The bill also requires timely payments of royalties and calls for interest penalties if payments are not made within 120 days.⁵⁹

53. W. VA. CODE ANN. § 37B-1-4(b) (West 2018).

54. W. VA. CODE ANN. § 37B-1-5 (West 2018).

55. W. VA. CODE ANN. § 37B-1-6 (West 2018).

56. H.B. 4270, 83d Leg., Reg Sess. (W. Va. 2018).

57. Rusty Marks, *Check Stub Bill Requires Accurate Reporting of Oil and Gas Royalties*, WV NEWS (Apr. 2, 2018), https://www.wvnews.com/news/wvnews/check-stub-bill-requires-accurate-reporting-of-oil-and-gas/article_e9c98e82-73f6-5a52-9859-bffa48f8b442.html.

58. W. VA. CODE ANN. § 37C-1-1 (West 2018).

59. W. VA. CODE ANN. § 37C-1-3 (West 2018).